84- 989

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NEWSPAPER DRIVERS AND HANDLERS, LOCAL NO. 372,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

OAKLAND PRESS COMPANY,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

Newspaper Drivers & Handlers Local #372,
A/W International Brotherhood Of Teamsters,
Chauffeurs, Warehousemen & Helpers Of America,
Petitioner,

v.

National Labor Relations Board,
Respondent,

The Oakland Press Company,
Intervenor.

No. 83-5311

United States Court of Appeals,
Sixth Circuit.

Argued April 13, 1984.

Decided May 31, 1984.

Gerry M. Miller (argued), Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, Milwaukee, Wis., for petitioner.

Elliott Moore, Deputy Associate Gen. Counsel, Rhonda G. Williford (argued), N.L.R.B., for respondent.

L. Michael Zinser (argued), King, Ballow & Little, Nashville, Tenn., for intervenor.

Before MARTIN and KRUPANSKY, Circuit Judges, and REED, District Judge.*

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* Honorable Scott Reed, United States District Judge for the Eastern District of Kentucky, sitting by designation.

BOYCE F. MARTIN, Jr., Circuit Judge.

The only remaining issue in this case, which has been before this court on two previous occasions, *see* 606 F.2d 689 (6th Cir.1979), and 682 F.2d 116 (6th Cir.1982), is whether an employer can be equitably estopped from claiming that workers previously recognized as "employees" under section 2(3) of the National Labor Relations Act are actually supervisors and thus not protected by the Act.

Newspaper Drivers and Handlers, Local Union No. 372 represents 15 district managers who work for the *Oakland Press,* a suburban Detroit newspaper. These district managers are responsible for overseeing the paper's delivery operations. Each manager supervises about 90 newspaper carriers who are responsible for the actual delivery of the paper to a subscriber's doorstep. The average carrier is 12 years old, has about 50 subscribers, earns about two dollars a day, and lasts about 6-12 months on the job. About 35 of the 1,250 carriers are adults who cover suburban car routes.

Beginning in 1970, the newspaper recognized the district managers as employees under section 2(3) of the Act. At that time, the paper characterized the carriers as independent contractors for the district managers. The paper recognized the union as the bargaining agent for the district managers after it won a representation election in 1971. However, in 1976, when the current bargaining agreement was about to expire, the newspaper reversed its position and refused to bargain with the union, claiming that the district managers were actually supervisors and, as such, not entitled to protection under the Act. *See* 29 U.S.C. § 164(a). The union then filed an unfair labor practice charge with the Board.

In the original proceedings before the Board, the administrative law judge found that the newspaper carriers were not really independent contractors but were not employees of the newspaper either. Because the carriers were not employees,

it followed that the district managers were not supervisors and so could form a bargaining unit that the newspaper must recognize. The Board adopted the administrative law judge's findings *in toto*. 229 N.L.R.B. 77 (1977). On appeal, this Court remanded the case to the Board for an express determination on the status of the newspaper carriers. *Oakland Press Co. v. NLRB*, 606 F.2d 689 (6th Cir.1979).

On remand, the Board reversed itself and its longstanding policy, *see Newsday, Inc.*, 171 N.L.R.B. 1451 (1968), and found that the newspaper carriers were employees within the meaning of section 2(3) of the Act and, therefore, that the district managers were supervisors not entitled to the protections of the Act. 249 N.L.R.B. 1081 (1980). On appeal to this Court, we affirmed the Board's determination that the carriers were employees and the managers supervisors,** but remanded once again, this time on the narrow issue of whether the newspaper was equitably estopped from claiming that the district managers were supervisors. *Newpaper Drivers & Handlers, Local Union No. 372 v. NLRB*, 682 F.2d 116 (6th Cir.1982). On remand, the Board found that equitable estoppel did not lie in this case because invoking the doctrine would contravene the basic policies of the Act. Moreover, even assuming that estoppel could lie, the Board found that the elements necessary to activate the doctrine were not present in this case. 266 N.L.R.B. 26 (1983). The union now petitions for review of this order and the Board cross-applies for its enforcement.

** The law of the case requires that we accept the Board's determination that the newspaper carriers are employees. *See, e.g., Hawkes v. Internal Revenue Service*, 507 F.2d 481, 481 n. 1 (6th Cir.1974). Nonetheless, we feel compelled to note our disagreement with this decision. It is difficult to imagine that 12-year-old children, working five hours a week for two dollars an hour, are the type of people to whom Congress intended to extend the protections of the National Labor Relations Act. It is even more difficult to imagine that such a group would, or even should, ever organize. To us, these

[1, 2] "Congress intended recognition of supervisors by employers for bargaining purposes [to] be completely voluntary." *District 2, Marine Engineers Beneficial Ass'n v. Amoco Oil,* 554 F.2d 774, 778 n. 5 (6th Cir.1977). *See also Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n,* 382 U.S. 181, 189, 86 S.Ct. 327, 331, 15 L.Ed.2d 254 (1965). The purpose of this rule ws to ensure "that no one, whether employer or employee, need have as his agent [i.e., supervisor] one who is obligated to those on the other side, or one whom, for any reason, he does not trust." H.Rep. No. 245, 80th Cong., 1st Sess. 17 (1947). This being the case, the only question for us is whether an employer's freedom of choice in this matter can be curtailed by prior conduct, *i.e.,* by the doctrine of equitable estoppel. The Board argues that it cannot. We must agree. In earlier cases, the Board has recognized the right of a company to challenge "employee status" of workers who have long been a part of recognized bargaining units, even when the duties of those workers remain unchanged. *See, e.g., The Washington Post Co.,* 254 N.L.R.B. 168, 168-69 (1981); *Brotherhood of Locomotive Firemen & Engineers,* 145 N.L.R.B. 1521, 1525 n. 10 (1964). Under these decisions, prior conduct of an employer is significant evidence as to the proper classification of employees, but it is not determinative. *Washington Post, supra,* at 169. While these prior decisions of the Board are not controlling on us, they do lend considerable support to the Board's position.

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children are much like the sheltered workshop people in *Key Opportunities, Inc.,* 265 N.L.R.B. No. 178 (1982), and the part-time student janitors in *San Francisco Art Institute,* 226 N.L.R.B. 1251 (1971), whom the Board has already determined are not employees for purposes of the Act. The only practical effect of this decision is to exclude from the Act a group of employees whom Congress surely intended would be covered by it.

Moreover, applying collateral estoppel in this area would frustrate a fundamental purpose of the Act, namely not requiring employers to bargain collectively with workers also connected with management. *See* 29 U.S.C. § 164(a) ("no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law ... relating to collective bargaining"). Such frustration of purpose cannot be allowed. In the related doctrine of waiver, the Supreme Court has recognized that waiver is not possible when it would result in a situation "inconsistent with the purposes of the statute at issue." *See Metropolitan Edison Co. v. NLRB,* ____ U.S. ____, ____ n. 10, 103 S.Ct. 1467, 1471 n. 10, 75 L.Ed.2d 387, 400 n. 10 (1983). So it should be with estoppel. Accordingly, we find that equitable estoppel cannot be invoked to prevent a company from challenging the "employee status" of workers it had previously recognized as employees.

The decision of the Board is enforced.

APPENDIX B

The Oakland Press Company, a Subsidiary of Capital Cities Communications, Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent,

Newspaper Drivers & Handlers' Local No. 372, etc.,
Intervenor.

No. 77-1320.

United States Court of Appeals,
Sixth Circuit.

Argued June 8, 1979.

Decided Oct. 4, 1979.

L. Michael Zinser, King & Ballow, Nashville, Tenn., for petitioner.

Elliott Moore, Anton Hazzar, Deputy Associate Gen. Counsel, N. L. R. B., Washington, D. C., Bernard Gottfried, Director, Region 7, N. L. R. B., Detroit, Mich., for respondent.

Before LIVELY, Circuit Judge, CECIL, Senior Circuit Judge, and BROWN, District Judge.*

---

* The Honorable Bailey Brown, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

CECIL, Senior Circuit Judge.

The Oakland Press Co., (Oakland), a subsidiary of Capital Communications, Inc., Petitioner, engaged in the business of publishing and printing a newspaper of general circulation, petitions this Court to review an order of the National Labor Relations Board (Board), Respondent, finding that Oakland had violated Section 8(a)(5) of the National Labor Relations Act (29 U.S.C. Sec. 151 et seq.) by refusing to bargain with the Union for new contracts. The Board cross petitions for enforcement of its order.

Two units of employees of Oakland, all Circulation Department Truck Drivers and City Dealer Drivers, hereafter Truck Drivers, together with all Circulation Department District Managers, hereafter District Managers, constitute the bargaining units involved in the action. The Labor Organization with which Oakland was charged with conducting negotiations is Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union).

In 1973 Oakland and the Union entered into separate contracts covering the two bargaining units, each of which provided in part as follows:

> "This Agreement shall be in full force and effect from June 1, 1973 to andincluding May 31, 1976, and shall continue in full force and effect from year to the year thereafter, unless written notice of desire to cancel or to terminate is served by either party upon the other at least sixty (60) days prior to the date of expiration."

On March 15, 1976, Elton L. Schade, Secretary-Treasurer of the Union, wrote identical letters to Oakland which stated in part:

> "You are hereby notified that Newspaper Drivers and Handlers Local 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen

and Helpers of America, desires to continue its current collective bargaining agreement with your firm, but also to negotiate certain changes or revisions in its provisions, including those set forth in memorandum agreements and other supplements thereto to take effect during the contract period commencing June 1, 1976.

"Local 372 offers to meet and confer with your representatives for the purpose of negotiating said changes or revisions at a mutually convenient date, time or place.

"The changes or revisions to be negotiated will be sent to you at a later date."

Robert Ballow, labor counsel for Oakland, received this letter some time after April first. He concluded that the Union had not followed the language of the termination clauses and, therefore, the contracts would automatically be renewed for a period of one year and were not now negotiable. The Administrative Law Judge made a finding of fact and concluded that the language of the letters was technically sufficient for a termination of the contracts in question and that they were subject to negotiation. The Board affirmed this finding.

Thus, we are confronted at the outset with the issue of whether these 1973 contracts were effectively terminated. This issue properly stated for our consideration is:

WHETHER SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COLLECTIVE BARGAINING AGREEMENTS COVERING THE TRUCK DRIVERS AND DISTRICT MANAGERS WERE EFFECTIVELY TERMINATED BY THE UNION, THEREBY REQUIRING PETITIONER TO NEGOTIATE WITH THE UNION FOR NEW AGREEMENTS CONCERNING ANY ISSUES COVERED BY THE AGREEMENTS INVOLVED.

It is provided in 29 U.S.C., Sec. 160(f) that

> "• • • the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall • • • be conclusive." See also *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

We summarize the evidence before the Administrative law Judge:

Counsel for the petitioner argues that since the letters of the Union did not specifically use the words "cancel" or "terminate" they did not comply with the language of the contracts for termination. In addition, he argues that the Union's letters unambiguously assert its desire to continue the agreements in force and negotiate only certain provisions of them. This, counsel claims, was the intention of the Union for the reason that there were provisions of the agreements which they did not want to open up to renegotiation, such as dues checkoff and picket line protecting clauses.

On one occasion, counsel for petitioner asked Schade, counsel for the Union, if he intended his letters of March 15, 1976 to terminate the contracts and he responded that he did not.

The Administrative Law Judge relies largely for the basis of his finding on the history of the negotiations between the parties.

The first collective bargaining agreement between these parties was entered into in 1972, effective through May 31, 1973. Like the agreements now before us, it provided for automatic renewal "unless written notice of desire to cancel or terminate (was) served by either party upon the other at least sixty (60) days prior to the date of termination." On March 8 and 9, 1973, the Union informed the petitioner that it desired

> "* * * to continue its current collective bargaining agreement with your firm, but also to negotiate certain changes or revisions in its provisions, including those set forth in schedules, memorandum agreements thereto, to take effect during the contract period commencing June 1, 1973."

The language of this letter is virtually identical to language of the Union letters in the case now before us. It was considered to terminate the agreement of 1972. The Law Judge considered that if that language terminated the contracts then, it was sufficient to terminate them now. The parties negotiated the collective bargaining agreements, now before us, on August 17, 1973, to be effective June 1, 1973 to May 31, 1976.

The record indicates that the parties arranged negotiating sessions and, in fact, met on several occasions in April, May and June 1976. At the hearing before the Administrative Law Judge, Robert Ballow, petitioner's counsel, testified, in effect, that, although he felt that the contract had not been terminated, he, nevertheless, wanted to allow the Union to construct a record during these sessions. As we said above, Ballow felt that the Union's letters constituted an attempt to negotiate changes in the contract but not terminate the contract.

Other evidence considered by the Law Judge consisted of letters of April 11th and 19th from Schade, Secretary-Treasurer of the Union, transmitting the Union's proposals. In each letter it was stated,

> "Enclosed please find (2) copies of the Union's proposal to amend the current District Managers contract which *expires on May 31, 1976.*" (Emphasis added)

The Law Judge found that the argument of counsel for petitioner

> "* * * does not take into consideration the past history of bargaining between these parties or other extrinsic evidence which clearly slows (sic) the Union's position and

> which reasonably puts the Respondent (employer) on notice concerning it."

He found further,

> "The point here is that the past practice was to treat the charging parties' letter as a letter to re-open the contract for negotiation of all substantive terms and absent agreement prior to May 31, the contract would terminate as of that date. However, the Union would consider entering into extension agreements."

We conclude that, while the record is susceptible to differing conclusions, "* * * substantial evidence on the record considered as a whole" supports the findings of the Administrative Law Judge which were adopted by the Board.

Accordingly, we enforce the order of the Board requiring Oakland to bargain with the Union for a contract with Truck Drivers. By Oakland's refusal to so bargain, it violated Section 8(a)(5) of the National Labor Relations Act.

We consider further the issue of whether District Managers were supervisors in the employ of Oakland. The employer claims that the District Managers are supervisors of the paper carriers and, thus, are not an appropriate unit for the negotiation of a collective bargaining agreement.

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. Sec. 152(11) "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization,

> but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 29 U.S.C. Sec. 164(a).

The record clearly indicates that the District Managers, working as salaried individuals in the Oakland offices, are responsible for the sale, promotion and delivery of newspapers within a given geographic area. To exercise these responsiblities, the record also clearly indicates that the District Managers have the authority to hire the newspaper carriers, assign them to specific routes, direct them with respect to the manner of delivering and collecting charges for the newspapers, as well as the authority to fire the carriers.

The determinative factor with respect to this issue is whether the paper carriers are employees of Oakland or are independent contractors. The definition of employee as contained in the statute is:

> "The term 'employee' shall include any employee * * * unless this subchapter explicitly states otherwise, * * * but shall not include * * * any individual having the status of an independent contractor, or any individual employed as a supervisor * * *" 29 U.S.C. Sec. 152(3)

The Administrative Law Judge found, and the record indicates that,

> "* * * most of the 1,250 paper carriers are children of approximately 12 years of age who have rather small routes and who deliver the newspaper on their skateboards, bicycles, by walking or on horseback. (There are about 35 motor routes handled by adults.) They typically have about 50 subscribers on their routes and typically make about $2.00 a day from this work—4 cents per paper. (The motor carriers have 175-200 subscribers and are paid 6

> cents per paper, 2 cents of which is to cover automobile expenses. Thus the adults make $7 to $8 per day, plus expenses.) They do not own their routes and indeed if they fail to deliver their papers or approximately collect for them, they are summarily terminated. "The evidence also shows that typically these young people maintain their routes for a period of 6 months to a year. (The adults tend to keep their routes somewhat longer.)

Admittedly, these paper carriers are under the direction and control of the District Managers. However, the Administrative Law judge, considering the evidence as he viewed it, concluded that,

> "* * * the District Managers are employees within the meaning of Section 2(3) of the Act and are not supervisors in that they do not exercise supervisory control over other employees of the employer."

Accordingly, he found that they were an appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

In so ruling, the Administrative Law Judge specifically refrained from deciding whether the paper carriers were actually independent contractors. Though he noted that the argument of the parties had been directed "to the question of whether or not (the paper carriers) are independent contractors," the Judge stated in his decision "that is not the real issue. The real issue is whether these individuals are employees." The Judge stated that he did not reach the question of whether the paper boys were independent contractors. With respect to this issue, the judge ruled that "as a matter of policy" the carriers should not be treated as employees.

The Board adopted the findings and conclusions of the Administrative Law Judge as its own.

We cannot accept the finding that, as a matter of policy, they are not employees. Whose policy? They are entitled to be definitely classified under the statute. Either they are legally employees or, according to law, they are not employees.

We remand the case to the Board for determination of the legal status of these paper boys with reference to their employment relationship to Oakland.

APPENDIX C

Newspaper Drivers And Handlers Local Union No. 372, Affiliated With International Brotherhood Of Teamsters, Chauffeurs, Warehousemen And Helpers Of America,

Petitioner,

v.

National Labor Relations Board,

Respondent,

and

The Oakland Press Company, a Subsidiary Of Capital Cities Communications, Inc.,

Intervenor.

No. 81-1023.

United States Court of Appeals,
Sixth Circuit.

Argued April 12, 1982.

Decided June 29, 1982.

Rehearing Denied Aug. 23, 1982.

Gerry M. Miller, Goldberg, Previant, Uelmen, Gratz, Miller, Levy & Brueggeman, Milwaukee, Wis., for petitioner.

Elliott Moore, Deputy Associate Gen. Counsel, Jolane Findley, N.L.R.B., Washington, D.C., L. Michael Zinser, Nashville, Tenn., for respondent.

Robert L. Ballow, King & Ballow, Daniel C. Kaufman, L. Michael Zinser, Nashville, Tenn., for intervenor.

Before EDWARDS, Chief Judge, MARTIN, Circuit Judge, and TUTTLE,* Senior Circuit Judge.

PER CURIAM.

This is the second time this case has been heard in this court. After the first hearing, it was remanded by a different panel for a determination of whether or not the newspaper carriers involved were as a matter of fact independent contractors or employees.

On review by the Board and by a divided two-to-one vote, the Board found, contrary to its long-standing previous policy, (*see Newsday, Inc.* 171 N.L.R.B. 1456 (1968)) that newspaper carriers were employees and hence that the district managers (whose status is actually at issue here) were supervisors so as to defeat their bargaining rights. The logic of this reversal appears to be entirely related to a change in composition of the Board, since the following facts relied upon by the Board in its decision were all available at the time of the *Newsday* decision.

The statutory review powers of this court are limited to determining as to the Board's fact findings only whether or not they are supported by substantial evidence on the whole record. Under that standard, there is no question but that the present fact-finding does have substantial support, as exemplified in the Board's recital of facts below:

> Certain factors point toward the independent contractor status of the carriers. Thus, (1) carriers are not on Respondent's payroll and are required to sign an agreement which gives them "the exclusive right" to service all subscribers on their particular route. (2) Their income, which is not in the form of wages or salaries, usually constitutes the dif-

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* Honorable Elbert P. Tuttle, Senior Judge, U.S. Court of Appeals for the Eleventh Circuit, sitting by designation.

ference between the price of each copy and the subscription rate. (3) Respondent does not withhold social security and income taxes on behalf of the carriers. (4) Respondent does not provide workmen's compensation for the carriers. (5) Respondent does not grant carriers any fringe benefits except for the option as to accident insurance. (6) Carriers are given an opportunity to enhance their income and are eligible for prizes and awards by obtaining new subscribers. (7) Carriers assume the risk of loss when subscribers on their route are delinquent and Respondent bills carriers if they fail to deliver any copies they have ordered. (8) Carriers who desire to have shoulder or saddle bags must purchase them unless their predecessor provides them with used bags without charge.

However, the foregoing factors are clearly outweighed by the following factors which, notwithstanding the characterization of the carriers in the route agreement as "independent," demonstrate their employees status:

(1) Respondent establishes the wholesale and retail price of the newspaper, thereby controlling to a great extent the carriers' income. (2) The opportunity for additional income through the carriers' efforts in securing new subscribers is limited because (a) the carriers must, with the exception of their own parents and immediate neighbors, deliver newspapers only within their assigned route and (b) the carriers are prohibited from delivering any other newspapers or printed material without authorization by Respondent. (3) Respondent has the unilateral right to change the size of the route. (4) Carriers are subject to transfer by the district managers. (5) The carriers have no proprietary interest in their route and are not required to post a bond or pay for the route or the subscriber list. (6) Carriers do not have to pay Respondent for copies which are damaged or lost for any reason. (7) Although carriers bear the loss in the event of a subscriber's delinquency,

> their risk is minimized by the district manager's assistance in seeking to collect from such subscribers. (8) Respondent finances promotional campaigns. (9) District managers have substantial control over the carriers by training newly hired carriers and substitutes, instructing them as to their duties, checking on and evaluating the carriers' performance, assigning them to new routes, resolving the complaints of subscribers and the grievances of carriers, and terminating carriers when their work is unsatisfactory.
>
> In view of the substantial control by the district managers over the carriers, the absence of the proprietary interest on the part of the carriers, their insulation from most losses, and the limited opportunity for significantly increasing their income, we now reverse our earlier finding and conclude in the light of the Board's more recent Decisions that the carriers are employees within the meaning of the Act.[10]

All this to the contrary notwithstanding, the union argues that the company should be equitably estopped from asserting a position completely inconsistent with its past conduct and representations.

Review of the Board's order indicates that the Board considered that this court's remand had precluded its review of this contention. We do not agree that this is a correct interpretaion of this court's remand opinion. There is no express limitation therein, and we find no reason to imply one. For the limited purpose of determination of the equitable estoppel issue, the case is remanded to the National Labor Relations Board.

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[10] See *Philadelphia Newspapers, Inc.*, 238 NLRB No. 110 (1978). See also *The Virginian-Pilot/Ledger Star, Capital Division of Landmark Communications, Inc.*, 241 NLRB No. 81 (1979), wherein the carriers were found to be employees despite the employer's past characterization of them as independent contractors.

BOYCE F. MARTIN, Jr., Circuit Judge, dissenting.

I respectfully dissent on the basis that I do not feel that there is any evidence whatsoever that equitable estoppel may be claimed by the petitioners. I would enforce the order of the Board.

APPENDIX D

The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc. ***and*** **Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Of America.** Case 7-CA-13059

May 6, 1977

DECISION AND ORDER

By Chairman Fanning and Members Pennello and Walther

On January 5, 1977, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board had delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs[1] and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge[2] and to adopt his recommended Order.

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[1] Respondent's request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] The Administrative Law Judge properly found, *inter alia,* that the Union's March 15, 1976, letters of notification to Respondent terminated their collective-bargaining agreements for the two employee units herein as of May 31, 1976. However, Respondent, in a subsequent motion to reopen the record, opposed by the Charging Party, contends that a March 11, 1977, letter from the Union to a new employee, which refers to the union-security provision in "the existing

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, The Oakland Press Co., a subsidiary of Capital Cities Communications, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order.

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contract," constitutes a clear admission by the Union that it did not terminate the collective-bargaining agreements. As the evidence adduced at the hearing before the Administrative Law Judge is sufficient to determine the contract termination issue, we find it unnecessary to consider the proffered evidence and we therefore deny Respondent's motion.

APPENDIX E

DECISION

Statement of the Case

James L. Rose, Administrative Law Judge: This matter was heard before me on October 18 and 19, 1976, at Detroit, Michigan, upon the General Counsel's complaint which alleged that the Respondent, The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc.,[1] had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §151, *et seq.*, by refusing to bargain with the Union for new contracts.

Involved in this case are two bargaining units of the Respondent's employees, both of which are represented by the Union. Collective-bargaining agreements covering both units were effective from May 31, 1973, to June 1, 1976. In each there was a termination clause the effect which was that in the event neither party give notice to "terminate or cancel" the respective contract 60 days prior to the May 31, expiration date, the contract would remain in full force in effect for an additional year.

On March 15, 1976, the union business agent sent identical letters to the Company by which it sought to "re-open" each contract and to negotiate certain changes.

The Company takes the position that these letters did not comply with the termination clause of the contracts and accordingly, each contract was automatically renewed as of June 1, 1976. Thus the Respondent states that it will bargain with the Union concerning any matters not covered by either contract, but it is not obligated to bargain concerning modification of any term.

---

[1] The name of the Respondent appears as amended pursuant to the Respondent's posthearing motion, which is thereby granted.

The General Counsel alleges that by refusing to bargain with the Union concerning mandatory subjects, specifically including proposed amendments to wages, hours, and terms and conditions of employment, the Company has thereby violated Section 8(a)(5) of the Act.

An additional issue in this matter concerns the unit of district managers, all of whom the Respondent claims are supervisors, inasmuch as they are in charge of the paper carriers. The General Counsel contends that the paper carriers are independent contractors. Thus the district managers do not supervise employees of the employer and are therefore not supervisors within the meaning of Section 2(11) of the Act.

All parties were represented by counsel and were given the opportunity to examine and cross-examine witnesses. Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT

I. BUSINESS OF THE RESPONDENT

The Respondent is a Michigan corporation, engaged in the business of publishing and printing a newspaper of general circulation. During the calendar year 1975, a representative period, the Respondent had gross revenues in excess of $1 million, advertised various nationally sold products revenues from which exceeded $500,000, and purchased goods, products, and materials valued in excess of $50,000 directly from points outside the State of Michigan.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, it is admitted by

the Respondent to be, and I find, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE BARGAINING UNITS

Although the Respondent did not admit the appropriateness of the unit description for the circulation department truckdrivers and city truckdrivers, there is no evidence in the record that this is not an appropriate bargaining unit.

Since at least 1972, the Respondent has in fact recognized the Union as the bargaining representative for such a unit. The Respondent and the Union have negotiated collective-bargaining agreements covering the unit of circulation department truckdrivers and so far as can be determined from the record, the Respondent continues to recognize the Union as the representative of these employees. Accordingly, I conclude that the following is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Circulation Department Truckdrivers and City Dealer Drivers of the Respondent, excluding all other employees, guards and supervisors as defined in the Act.

As indicated above, the Respondent denies the appropriateness of the unit of district managers on grounds that these individuals are supervisors within the meaning of the Act. Thus the Respondent argues that it may voluntarily bargain with the representative of such employees, but it need not do so and failure to do so is not violative of the Act.

The question of whether the district managers constitute an appropriate bargaining unit depends on the status of some 1,250 individuals who deliver newspapers for the Respondent.

The Respondent contends that these 1,250 individuals are employees within the meaning of Section 2(3) and since the district managers have the authority to hire them, fire them, direct them, and the like they are necessarily supervisors within

the meaning of Section 2(11) of the Act. The General Counsel, on the other hand, contends that the paper carriers are independent contractors and therefore the district managers are not supervisors of employees. Without necessarily concluding that the carriers are independent contractors, I do agree that they are not employees. And whatever supervisory authority the district managers may exercise, it is not supervision of employees. Therefore they are not supervisors within the meaning of the Act. *Newsday, Inc.,* 171 NLRB 1456 (1968).

As to the status of the paper carriers, the evidence and argument is directed principally to the question of whether or not they are independent contractors. Of course if they are, then they are not employees. But that is not the real issue. The real issue is whether these individuals are employees. I conclude they are not, without deciding whether they are actually independent contractors.

The Respondent sought to show that it maintains control over the manner and means by which the carriers deliver the papers, and the Respondent presented evidence of a number of indicators found by the Board to establish such "right of control." On the other hand, the General Counsel sought to establish that the Respondent controls only the result—delivery of the newspapers to specified customers by a certain time each day. And the General Counsel presented evidence of some indicators found by the Board to demonstrate lack of control over the manner and means.

In brief, the material facts show that most of the 1,250 paper carriers are children of approximately 12 years of age who have rather small routes and who deliver the newspaper on their skateboards, bicycles, by walking, or on horseback. (There are about 35 motor routes handled by adults.) They typically have about 50 subscribers on their routes and typically make about $2 a day from this work—4 cents per paper. (The motor carriers have 175-200 subscribers and are paid 6 cents per paper, 2 cents of which is to cover automobile expenses. Thus the adults make

$7 to $8 per day, plus expenses.) They do not own their routes and indeed if they fail to deliver the papers or appropriately collect for them, they are summarily terminated.

The evidence also shows that typically these young people maintain their routes for a period of 6 months to a year. (The adults tend to keep their routes somewhat longer.)

It is difficult to conceive that subteenage children who carry newspapers for a period of 6 months to a year for which they are paid in the range of $2 a day are entrepreneurs in the traditional sense of an independent contractor. This, however, does not necessarily mean that they should be considered employees. Their employment, if any, is very minimal, amounting to only a few hours a week and lasts, as indicated, typically less than a year. The question here is not so much whether a 12-year-old who delivers newspapers 1 hour a day on a skateboard is an entrepreneur, but whether, as a matter of policy, they (or the adults) should be treated as employees.

Though the factors cited by the parties do have some bearing on whether one is found to be an independent contractor or not, there are additional, and important considerations here.

Specifically, the Respondent has always treated the carriers as nonemployees, and still does. The Respondent does not consider them employees for purposes of income tax withholdings, the Federal Insurance Contributions Act, unemployment compensation, or workmen's compensation.

Unlike other employees, the carriers sign a "lease" agreement and post a $10 bond. The Respondent has clothed them with indicia of independent contractors and in 1970 agreed that they were nonemployees when the district managers unit was organized.

From the record as a whole, it is clear that the Respondent's contention that these carriers are employees is taken for purposes of this case only.

Newsday, Inc., supra, was also a case involving whether district managers who supervised carriers were employees and, as here, this hinged on the status of the carriers. The carriers' duties, their ages, pay, method of delivery were essentially identical to the facts here. The employer, as here, had always considered carriers to be "independent contractors." The Board found that the carriers not to be employees and hence the district managers were not supervisors. The Board therefore found appropriate the petitioned-for unit of district managers. As to the foot carriers, *Newsday* is on all fours with the instant case. The motor carriers' situation here is not sufficiently different to change the result.

I therefore conclude that the district managers are employees within the meaning of Section 2(3) of the Act and are not supervisors in that they do not exercise supervisory control over other employees of the employer. The following is a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All Circulation Department District Managers of the Respondent, excluding all other employees, guards and supervisors as defined in the Act.

IV. THE UNFAIR LABOR PRACTICE

The 1973-76 contracts covering the two bargaining units in question have identical "termination" articles which read, in material part:

> This Agreement shall be in full force and effect from June 1, 1973, to and including May 31, 1976, and shall continue in full force and effect from year to the year thereafter, unless written notice of desire to cancel or to terminate the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration.

On March 15, 1976, Elton L. Schade, secretary-treasurer of the Union, wrote identical letters to the Respondent which stated, in material part:

> You are hereby notified that Newspaper Drivers and Handlers Local 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, desires to continue its current collective bargaining agreement with your firm, but also to negotiate certain changes or revisions in its provisions, including those set forth in memorandum agreements and other supplements thereto to take affect during the contract period commencing June 1, 1976.
>
> Local 372 offers to meet and confer with your representatives for the purpose of negotiating said changes or revisions at a mutually convenient date, time and place.
>
> The changes or revisions to be negotiated will be sent to you at a later date.

The Respondent's new labor counsel, Robert Ballow, received this letter sometime on or after April 1. He concluded that the Union had not followed the language of the termination clauses of the contractors and therefore did not, by sending this letter, appropriately terminate either contract. Ballow concluded that the two contracts would automatically be renewed for a period of 1 year.

Negotiation sessions were set up and the parties in fact met on several occasions in April, May, and June.[2] A fair summary of Ballow's testimony, and that of Schade, is that during these negotiation sessions Ballow undertook to construct a record. In effect he stated that, even though the contract was not appropriately terminated, he nevertheless wanted to give the Union an opportunity to do so but that Schade refused.

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[2] The contract requires bargaining to commence at least 45 days before the May 31 expiration date. Though mentioned in its brief, the Respondent apparently does not contend that violation of this language excused its refusal to bargain. The first session of April 21 (less than 45 days from May 31) was arranged on April 6 to the mutual satisfaction of both parties.

Thus Ballow argues that the Union's letter was an attempts on the part of the Union to negotiate changes in the contract but at the same time not have the contract terminate, because were the contract to terminate, "contractual provisions" (as opposed to those which covered mandatory subjects of bargaining) wou'd immediately come to an end, particularly including dues checkoff.

Ballow's carefully construed argument has a medieval tone. Since Schade did not use the appropriate magic words in the March 15 letter, it could not have terminated the contract. This, however, does not take into consideration the past history of bargaining between these parties or other extrinsic evidence which clearly slows the Union's position and which reasonably put the Respondent on notice concerning it.

Having carefully considered Ballow's testimony, I am persuaded that, following receipt of the Union's March 15 letter, he undertook to posture the Respondent in such a way that by using a technicality, which Ballow admits, the Respondent would not be required to bargain with the Union over the subjects covered in the two contracts until 1977. I conclude that this was a deliberate attempt to avoid the Respondent's obligation to bargain with the Union on the full range of mandatory subjects. If the March 15 letter was inartfully drafted, at best the defect was technical.

A mere technical deficiency in complying with the termination of clause of a contract is not sufficient reason to excuse one's obligation to bargain in good faith.

In a substantially similar situation, the union did not give the proper termination notice under the contract but it did file with the Federal Mediation Conciliation Service Standard Form F-7, a copy of which was sent to the employer within the appropriate time interval. In finding that such a notice was legally effective to reopen the contract for negotiations, the Board adopted Ad-

ministrative Law Judge Fitzpatrick's reasoning which concluded that "So long as the essential message was conveyed, it is not reasonable for Respondent to hold them to the standards of a Philadelphia lawyer." *Champaign County Contractors Association,* 210 NLRB 467, 470 (1974).

Similarly, in *South Texas Chapter, Associated General Contractors,* 190 NLRB 383 (1971), the union had failed to use the word "termination" in its reopening letter. Nevertheless, in analyzing the letter against the contract clause, the Board concluded that the union had in fact terminated the contract and the employer was therefore required to bargain for a new one. The significance of this case does not involve the particular words of the Union's letter. Rather, the Board will interpret an ambiguous letter to find the union's true intent.

I find that the essential message was in fact conveyed, even if not in the precise, technical terms of the contract. It is clear from the letter that the Union considered the contract would expire on May 31 and it wished to negotiate changes to take effect "during the contract period commencing June 1, 1976." A collective-bargaining agreement is a total document. Changes in one or more of its terms necessarily implies termination of the agreement and emergence of a new one. The Union's March 15 letter necessarily implied termination.

In 1973, Schade sent the identical letter to the Respondent concerning negotiating new contracts. At that time there was no question concerning the effectiveness of the letter and indeed the parties did negotiate new contracts. Inasmuch as they were unable to reach these agreements until after the May 31, 1973, expiration date, extension agreements were entered into.

The point here is that the past practice was to treat the Charging Parties' letter as a letter to reopen the contract for negotiation of all substantive terms and absent agreement prior to May 31 the contract would terminate as of that date. However, the Union would consider entering into extension agreements.

Further evidence of Schade's actual intent are his letters of April 11 and 19 transmitting the Union's proposals. He stated in each letter: "Enclosed please find two (2) copies of the Union's proposal to amend the current District Managers contract, which expires on May 31, 1976."

Schade would not have used the phrase "which expires on May 31, 1976," had he in fact taken the position that the contract would continue in full force in effect after that date.

The Respondent contends that on every occasion from April 6 on, when asked if he intended by his March 15 letter to have terminated the contracts, Schade responded in the negative. Thus at the April 21 meeting, Ballow gave Schade a letter which said, in material part, "It is the understanding of The Oakland Press that any agreement—written, oral, or implied—or any condition of employment between the parties will terminate as of May 31, 1976."

Since Schade did not agree to the conclusions of this letter, such means, according to the Respondent, that the Union did not intend that the contracts would terminate as of May 31. Such is a possible construction of Schade's response. Equally possible, and in my view more probable, Schade did not believe that all conditions of employment should or would terminate.

At the April 21 meetings, and those which followed, Ballow may very well had been talking about terminating the collective-bargaining agreement but keeping such matters as wages in effect, at least until impasse. However, I believe Schade when he says that he thought Ballow was talking about terminating the collective-bargaining relationship. Schade may be an experienced labor representative but that does not necessarily mean that he is totally versed in the fine nuances of words of art in these matters. At best there was confusion and no real meeting of the minds concerning what the parties meant when they talked about what the Union intended by its March 15 letter.

Ballow testified from extensive notes he took during the negotiating sessions. As indicated, the thrust of his testimony is that he asked the union spokesman (normally Schade but on occasion Edgar Scribener, the Union's president) whether the Union had intended to terminate the contract. Every time he was told no. While I have no doubt that Ballow's testimony is literally accurate, I am also convinced that it is incomplete and does not present the true picture.

For instance, Ballow testified concerning the May 26 meeting in part:

> He [Scribener] said the union was going to operate on the same basis that it has operated in the past. The union felt it had a contract which expired on May the 31st, 1976. He understood the company's position, that they had a one year extension. And I said, "Now, Mr. Scribener, you've injected a new word into this. You are now using the word 'expire' for the first time that I have heard it."

It may be that this was the first time a union representative had actually spoken the word "expire" during their meetings. But this was not the first usage of the word in this matter. Schade's letter of April 11 and 19 transmitting his proposals referred to the contract "which expires on May 31, 1976."

In any event, regardless of what occurred on and after April 21, the question is whether or not the letter of March 15 was sufficient to terminate the contract such that the Respondent would be required to negotiate with the Union for a successor agreement and bargain in good faith on all mandatory subjects.

I find that the Union substantially complied with the termination clause of the contract. In addition to sending the letter of March 15, Schade filled out the Federal Mediation Conciliation Service Form F-7 which also went to the Respondent. Reading the letter in light of the parties' past practice, along with the FMCS Form F-7, there can be no doubt concerning what the

Union had in mind—to reopen the collective-bargaining agreement for negotiation on all matters involving wages, hours, and terms and conditions of employment. In short, to terminate the 1973-76 contracts and negotiate new ones at any time.

The Respondent cites several cases where the Board "strictly construed" the provisions of a contract which foreclosed automatic renewal. These cases are substantively distinguishable in that they dealt with the time period within which notice must be sent. Even so, "the Board will consider mitigating circumstances, in determining the timeliness of a notice," such as the postal service not promptly delivering the letter. Mailing the letter was considered to be compliance with the termination clause. *United Electronics Institute of Iowa,* 222 NLRB 814 (1976).

This situation is in any event more analagous to *Champaign County Contractors Association, supra,* and *South Texas Chapter, Associated General Contractors, supra,* where the Board looked through form to substance and found sufficient compliance with the termination clause to foreclose automatic renewal.

But the Respondent contends that the Union had a reason for not actually terminating the contract during these negotiations —namely, to be able to have the production of the picket line clause should other unions strike. The Respondent also argues that, upon termination, the "noncontractual" checkoff provision would automatically end, and this the Union did not want. There is no evidence, however, that during their several meetings Ballow ever explained this Byzantine reasoning when he was attempting to "clarify" the Union's position. Further, there is no evidence that other unions would strike during the period following May 31 when the Union and the Respondent might still be negotiating. Finally, there was no picket line clause in the district managers' contract and therefore Ballow's reasoning would not be applicable to that situation in any event.

Nor does it follow that the checkoff clauses would automatically terminate.

In attempting to give credibility to its contention that it believed the Union had not terminated the contract, the Respondent attributes a strategy to the Union that I find it did not have.

Each of these contracts has a no-strike probation. Thus the Respondent's reasoning also implies that the Union set out to negotiate changes knowing that the Respondent was not required to bargain concerning those subjects covered in the contracts and knowing that it was foreclosed from using economic pressure. Such is so unreasonable that the Respondent could not seriously have believed this to be the Union's bargaining posture.

I am persuaded that the Respondent knew what the Union had in mind when it sent the March 15 letter—to renegotiate, as it had in the past, a new contract, which implies termination of the old. Had Ballow accepted this and undertaken to negotiate with the Union during April and May, it is not unreasonable to conclude that the contract would have been executed by May 31 or at least shortly thereafter. It is also reasonable to believe that the parties would have entered into an extension agreements as they had in the past. By raising this issue of whether the Union's notice effectively "terminated" the contract, the Respondent obstructed what had previously been an amiable collective-bargaining relationship. By doing so and by now refusing to renegotiate with the Union concerning all mandatory subjects of bargaining, the Respondent has violated its obligations under Section 8(a)(5) of the Act.

In view of the foregoing, I find it unnecessary to decide the additional issue of whether or not the Respondent waived the alleged inadequacy of the notice.

Conclusions Of Law

1. The Oakland Press Company, a Subsidiary of Capital Cities Communications, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) fo the Act.

2. Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All circulation department truckdrivers and city dealer drivers of the Respondent, excluding all other employees, guards, and supervisors as defined in the Act is a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. All circulation department district managers of the Respondent, excluding all other employees, guards, and supervisors as defined in the Act is a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. The above-named Union is, and at all times material hereto has been, the exclusive collective-bargaining representative of the employees in the units described in paragraphs 3 and 4 above.

6. On or about March 15, 1976, the Union sent appropriate notices to the Respondent pursuant to the provisions of the collective-bargaining agreements in existence between it and the Respondent covering employees in the units above described to terminate or cancel the respective contract and to renegotiate a new contract.

7. The Respondent, by failing and refusing to bargain collectively with the Union as the exclusive representative of the employees in the above-described units concerning mandatory subjects of bargaining since on or about April 21, 1976, has

engaged in and is engaging in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

8. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent engaged in an unfair labor practice, I will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I will recommend that the Respondent be ordered, upon request from the Union, to bargain with the Union as the representative of the employees in the units herein found appropriate concerning all mandatory subjects of bargaining, and if an understanding is reached to embody the same into a written signed agreement.

I further recommend that the Respondent post the notice set forth in the appendix attached to this Decision.

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[3]

The Oakland Press Company, Detroit, Michigan, a Subsidiary of Capital Cities Communications, Inc., its officers, agents successors, and assigns, shall:

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[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Failing and refusing to bargain collectively upon request with Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of its employees in the above-described appropriate units with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right is affected by the proviso to Section 8(a)(3) of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization as exclusive representative of all employees in the above-described bargaining units with respect to rates of pay, wages, hours of work, and other terms and conditions of employment and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its principal office copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provid-

[4] In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ed by the Regional Director for Region 7, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply therewith.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all sides had the opportunity to present evidence, the National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post this notice and to comply therewith.

WE WILL NOT fail or refuse to bargain collectively, upon request, with Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees in the appropriate units described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. The bargaining units are:

All Circulation Department Truckdrivers, and City Dealer Drivers, excluding all other employees, guards and supervisors as defined in the Act.

All Circulation Department District Managers, excluding all other employees, guards, and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right is affected by the proviso to Section 8(a)(3) of the Act.

WE WILL bargain collectively, upon request, with Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees in the appropriate units described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

THE OAKLAND PRESS CO.
A SUBSIDIARY OF CAPITAL
CITIES COMMUNICATIONS,
INC.

APPENDIX F

The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc. *and* Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case 7-CA-13059

June 6, 1980

SUPPLEMENTAL DECISION AND ORDER

By Chairman Fanning and Members
Penello and Truesdale

On May 6, 1977, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] The Board therein adopted, *inter alia,* the Administrative Law Judge's finding that the carriers are not employees and that therefore the circulation department district managers directing them are not statutory supervisors but are employees with whom Respondent refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act, as amended.

Thereafter, Respondent petitioned the United States Court of Appeals for the Sixth Circuit to review and set aside the Board's Order, and the Board filed a cross-application for enforcement of its Order. On October 4, 1979, the court issued its opinion wherein it, *inter alia,* remanded to the Board the issue of the employee status.[2] The Board accepted the remand and invited the carriers' parties to submit statements of position with respect to the issues raised by the remand. The General Counsel, Respondent, and the Union thereupon filed such statements with the Board.

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[1] 229 NLRB 476.

[2] 606 F.2d 689.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed its Decision in the light of the court's opinion and the statements of position and has decided for the reasons set forth below that the carriers are employees within the meaning of the Act and the district managers are supervisors within the meaning of the Act.

Respondent, which is engaged in the publishing and printing of The Oakland Press, has that newspaper delivered to city and suburban subscribers respectively by about 1,250 city carriers, whose ages range from 11 to 14 years, and about 35 to 40 adult motor route suburban carriers. They are directly responsible to 1 of 15 district managers who in turn report to the 2 zone managers to discuss scheduling and other problems that may arise. The circulation manager has overall responsibility for the entire circulation department.

The carriers are hired by a district manager to make house-to-house deliveries within a prescribed route in his particular district. In this connection, applicants for both city and suburban routes are required to sign a document[3] entitled "The Oklahoma Press Independent Carrier's Route Agreement," which provides, *inter alia,* that (1) the carrier has "the exclusive right" to service all home delivery subscribers on a particular route; (2) the carrier regularly, efficiently, and promptly deliver and sell the Oakland Press to all home subscribers on the route "at the established rate"; (3) the carrier does all in his power to promote and extend the circulation of that newspaper; (4) the carrier does not deliver any other newspaper or other type of printed material not authorized by Respondent; (5) the carrier

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[3] Parents of city carriers are also required to sign said agreement after the district manager explains their duties.

supply a substitute when he is unable to make deliveries; (6) the carrier regularly and promptly pay to Respondent the "established wholesale price" for all copies of the newspaper ordered by him; and (7) either party may terminate the agreement "without cause" upon 30 days' notice and Respondent may terminate the agreement "without notice for good and sufficient reason."[4]

Pursuant to the terms of the agreement, the city and suburban carriers sell the newspapers at subscription rates set by Respondent. They usually receive 4 and 6 cents respectively for each subscription copy they deliver.[5] In those situations where there are too few subscribers to produce sufficient income to attract and retain carriers, Respondent "subsidizes" the route by providing the carriers with a "bonus."

Carriers are encouraged to secure more subscribers within their own routes.[6] Carriers are also expected to participate in promotional campaigns, which are financed by Respondent, and are rewarded with prizes or trips for obtaining additional subscribers. When Respondent offers "money back guarantees" to new subscribers, it is Respondent rather than the carrier who makes such reimbursements to thos subscribers who request it.

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[4] An older form of the agreement, which was discontinued about 1973, referred to the carrier as a separate and independent contractor and required him to post a bond of $10.

[5] Carriers receive somewhat less when delivering sample copies which Respondent makes available without charge to potential subscribers.

[6] However, carriers who do not live within their assigned routes are permitted to serve their own family and immediate neighbors.

Carriers must make regular payments to Respondent for all non-paid-in-advance subscribers[7] including those who are delinquent. If a carrier fails to deliver any of the copies he has ordered, Respondent bills him for them. However, Respondent replaces without cost to the carrier copies which are damaged or lost for any reason.

Respondent does not make deductions on behalf of the carriers for social security and income tax purposes. They do not receive any of Respondent's fringe benefits such as those pertaining to vacations and hospitalization and are not covered by workmen's compensation, but Respondent pays part of the premium for accident insurance if a carrier desires such coverage.

Respondent, which no longer requires new carriers to post a bond, does not sell routes to new carriers and forbids departing carriers to do so. Respondent furnishes carriers without charge collection cards and routebooks and provides without cost to suburban carriers tubes in which they are required to deposit the newspapers they deliver. Suburban carriers also receive a vehicle allowance, the amount of which is calculated by the district manager who determines the mileage by accompanying the carrier on his rounds. Thus, carriers incur no expense of their own in taking over a route except for the nominal cost of a bag which, however, is not mandatory, and may be given to them without charge by their predecessors.

The district managers see to it that the carriers perform their duties properly. As indicated above, they explain to newly hired carriers, whose average length of service appears to be from 6 months to a year, what is expected of them with respect to prompt delivery in a dry location, collections, and participation in promotion campaigns. In some cases, district managers accom-

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[7] All paid-in-advance subscribers make their payments directly to Respondent.

pany new carriers to point out the best way to handle the route. Generally, however, new carriers are shown the route by their predecessors. Thereafter, the district managers check on the various aspects of the performance of the carriers, about 30 percent of whom require special attention.

As indicated above, district managers carefully monitor the carriers in regard to collections and insist that they turn them in promptly. In the event that a subscriber is delinquent or a "slow payer," the district manager accompanies the carrier to straighten out the matter with the subscriber and, if necessary, cancel the subscription. The carrier's authority in this regard is limited to situations where a subscriber has moved away.

Upon receipt of complaints from subscribers as to poor service or litter at bundle drop locations where newspapers are picked up by carriers, the district manager takes up the complaint with the carrier and telephones or visits the subscriber to settle it. The district managers also handle the carriers' grievances as to difficulties in dealing with certain subscribers.

Although carriers are expected to provide substitutes who must be satisfactory to the district manager, if they are unable to work at any time, the district manager has the responsibility to find a substitute when the carrier fails to do so.[8] If the substitute is inexperienced, the district manager instructs him as to the rules regarding proper delivery and collections.

The district managers decide whether to split or consolidate routes and set the boundaries thereof. They also transfer the carriers from one route to another and make recommendations as to which carriers should be cited for excellent performance or deemed eligible for participation in a paid scholarship program. Finally, the district managers decide whether to terminate carriers who refuse to make deliveries in designated locations, per-

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[8] Substitutes are paid by either carriers or Respondent.

sist in refusing to participate in promotional campaigns,[9] or otherwise perform their duties in an unsatisfactory manner.

Respondent contends that the carriers are employees and that the district managers who direct their activities are statutory supervisors with whose representative it has no duty to bargain. However, the General Counsel and the Union argue that the carriers are independent contractors, that Respondent's past characterization of them as such belies its present position, and that therefore the district managers cannot be deemed statutory supervisors despite their role in exercising authority over the carriers.

The first issue to be resolved is the status of the carriers. In determining whether individuals are independent contractors or employees under the Act, the Board has consistently applied the right-to-control test. Under this test, an employer-employee relationship exists when the employer reserves the right to control not only the result to be achieved but also the means to be used in attaining the result. However, when the employer has reserved only the right to control the ends to be achieved, an independent contractor relationship exists.

Certain factors point toward the independent contractor status of the carriers. Thus, (1) carriers are not on Respondent's payroll and are required to sign an agreement which gives them "the exclusive right" to service all subscribers on their particular route. (2) Their income, which is not in the form of wages or salaries, usually constitutes the difference between the price of each copy and the subscription rate. (3) Respondent does not withhold social security and income taxes on behalf of the carriers. (4) Respondent does not provide workmen's compensation for the carriers. (5) Respondent does not grant car-

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[9] Although Ronald Hoadley, one of the district managers, testified that he would "probably" take no action against such a carrier, Circulation Manager Richard Land testified that district managers have the authority to terminate carriers for that reason.

riers any fringe benefits except for the option as to accident insurance. (6) Carriers are given an opportunity to enhance their income and are eligible for prizes and awards by obtaining new subscribers. (7) Carriers assume the risk of loss when subscribers on their route are delinquent and Respondent bills carriers if they fail to deliver any copies they have ordered. (8) Carriers who desire to have shoulder or saddle bags must purchase them unless their predecessors provide them with used bags without charge.

However, the foregoing factors are clearly outweighed by the following factors which, notwithstanding the characterization of the carriers in the route agreement as "independent," demonstrate their employees status:

(1) Respondent establishes the wholesale and retail price of the newspaper, thereby controlling to a great extent the carriers' income. (2) The opportunity for additional income through the carriers' efforts in securing new subscribers is limited because (a) the carriers must, with the exception of their own parents and immediate neighbors, deliver newspapers only within their assigned route and (b) the carriers are prohibited from delivering any other newspapers or printed material without authorization by Respondent. (3) Respondent has the unilateral right to change the size of the route. (4) Carriers are subject to transfer by the district managers. (5) The carriers have no proprietary interest in their routes and are not required to post a bond or pay for the route or the subscriber list. (6) Carriers do not have to pay Respondent for copies which are damaged or lost for any reason. (7) Although carriers bear the loss in the event of a subscriber's delinquency, their risk is minimized by the district manager's assistance in seeking to collect from such subscribers. (8) Respondent finances promotional campaigns. (9) District managers have substantial control over the carriers by training newly hired carriers and substitutes, instructing them as to their duties, checking on and evaluating the carriers' performance, assigning them to new routes, resolving the complaints of

subscribers and the grievances of carriers, and terminating carriers when their work is unsatisfactory.

In view of the substantial control by the district managers over the carriers, the absence of the proprietary interest on the part of the carriers, their insulation from most losses, and the limited opportunity for significantly increasing their income, we now reverse our earlier finding and conclude in the light of the Board's more recent Decisions that the carriers are employees within the meaning of the Act.[10]

We turn now to the question whether the district managers are employees or supervisors within the meaning of the Act. It is clear from the foregoing that the district managers hire, discharge, assign, transfer, and responsibly direct the carriers whom we have found to be employees. We therefore find that the district managers are supervisors within the meaning of Section 2(11) of the Act. As employers do not have a statutory obligation to bargain with their supervisors, we withdraw our previous finding that Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union on behalf of the district managers. We shall therefore modify our original Order accordingly.

ORDER

It is hereby ordered that the complaint herein is dismissed insofar as it alleges that the Respondent, The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc., Detroit, Michigan, violated Section 8(a)(5) of the Act by refusing to bargain with Local 372, international Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

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[10] See *Philadelphia Newspapers, Inc.*, 238 NLRB 835 (1978). See also *The Virginian-Pilot/Ledger Star, Capital Division of Landmark Communications, Inc.*, 241 NLRB No. 81 (1979), wherein the carriers were found to be employees despite the employer's past characterization of them as independent contractors.

America, on behalf of the circulation department district managers.

Member Truesdale, dissenting:

The facts in this case are, in most critical respects, the same as those in *The Virginian-Pilot/Ledger-Star,* 241 NLRB No. 81 (1979), in which I dissented from the majority's findings there that the newspaper carriers were employees and that the district managers were supervisors within the meaning of Section 2(11) of the Act. For the reasons stated in my dissent in *Virginian-Pilot/Ledger-Star,* and those explicated below, I would find—contrary to my colleagues—that the newspaper carriers here are independent contractors, that the district managers are employees within the meaning of Section 2(3) of the Act, and that Respondent therefore unlawfully refused to bargain with the Union representing the unit of district managers.

Until recently, Respondent maintained that the carriers were independent contractors.[11] Its present position, as announced at the hearing in this matter, is that newspaper carriers are employees. However, the record evidence, including Respondent's past characterization of its business relationship with the carriers, belies its present position. Thus, Respondent's current agreement governing its relationship with the carriers refers to the carrier as an "independent carrier." Also, Respondent's insurance policy specifically uses the legal term "independent contractor" in referring to the carrier. While these facts are not alone controlling, they do manifest Respondent's intention to avoid creating an employer-employee relationship with the newspaper carriers.

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[11] In 1970, when a petition was filed seeking a unit of district managers, Respondent asserted that the unit was inappropriate because both the district managers and carriers were independent contractors.

When the foregoing is considered in conjunction with the evidence, *infra,* showing that Respondent has clothed the carriers with the indicia of an independent contractor, it becomes clear that the relationship Respondent has established with its paper carriers is that of employer-independent contractor. Unlike its regular employees, carriers are not on Respondent's payroll and do not receive any of the fringe benefits accorded to regular employees. Carriers are also not entitled to workmen's compensation. Rather than wages or salaries, the carriers' compensation consists of the difference between the wholesale price of the newspaper and the amount collected from customers at the suggested retail price. Also, no deductions for Federal and state taxes are made by Respondent from the carriers' profits. Significantly, carriers, unlike regular employees, are required to sign an agreement, entitled "Oakland Press Independent Carrier's Route Agreement,"[12] before they can assume responsibility for the route.

Of particular importance to the carriers' independent contractor status is the fact that the carriers' parents are present when the agreement is signed, thus signaling the important intermediary role played by the parents in the relationship between the carrier and Respondent. This role is born of the fact that Respondent has no authority to discipline the carrier and therefore Respondent undoubtedly prevails upon the parents to exercise their authority to see that the paper is delivered. In addressing this point in my dissent in *Virginian-Pilot/Ledger-Star,* I stated:

> As a natural corollary of their youth, carriers necessarily require the continued guidance and supervision of their parents in their daily activities. Because of this continuing

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[12] The agreement requires either party to give 30 days' notice of an intent to terminate the agreement. Respondent, however, may terminate the agreement "without notice for good and sufficient reason."

responsibility of parents for their children, it is ony natural that the Employer actively recruits their aid in controlling the carriers in the operation of their routes. However, by interposing the parents into that relationship between the carrier and itself, the Employer has effectively severed its lines of control over the carrier. As a result, the intermediation of the parents into this relationship, along with other factors discussed above, compels the conclusion that carriers are independent contractors.

The carrier's independent contractor status is also evidenced by the fact that the carrier's overall opportunity for profit or loss lies almost entirely within his own efforts. Further, the carrier's risk of loss, when measured against the small scale of his business, is also substantial. Thus the carrier alone bears the loss when he is robbed, when papers are damaged, or when the customer fails to pay.

Finally, the large number of carriers for whom a district manager is responsible strongly militates against the finding of employee status. Thus, the district manager is responsible for approximately 90 carriers who perform their delivery tasks at roughly the same time every day. The majority's finding that Respondent exercises substantial control over the carriers' delivery tasks is therefore clearly unfounded, especially in light of the short-term character of the delivery schedule and the relatively simple and routine nature of the delivery tasks. In short, the evidence indicates that Respondent's sole concern is with the end result—the timely delivery of the newspaper and the prompt payment of sums owed to it.

In light of all the foregoing, I would find that the carriers are independent contractors and would accordingly find that the district managers are employees and constitute a unit appropriate for collective bargaining under the Act. I would therefore find that Respondent has violated Section 8(a)(5) of the Act by refusing to bargain with the Union that currently represents the district managers.

APPENDIX G

The Oakland Press Co., a Subsidiary of Capital Cities Communications, Inc *and* Local 372, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.
Case 7-CA-13059

February 7, 1983

SECOND SUPPLEMENTAL DECISION

By Members Jenkins, Zimmerman, and Hunter

On May 6, 1977, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] The Board then adopted, *inter alia,* the Administrative Law Judge's finding that the carriers are not employees and that therefore the circulation department district managers directing them are not statutory supervisors but are employees with whom Respondent refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act, as amended.

Thereafter, Respondent petitioned the United States Court of Appeals for the Sixth Circuit to review and set aside the Board's Order, and the Board filed a cross-application for enforcement of its Order. On October 4, 1979, the court issued its opinion wherein it, *inter alia,* remanded to the Board the issue of the carriers' employee status.[2] The Board accepted the remand and invited the parties to submit statements of position with respect to the issues raised by the remand. The General Counsel, Respondent, and the Union thereupon filed such statements with the Board.

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[1] 229 NLRB 476.

[2] 606 F.2d 689.

On June 6, 1980, the Board issued a Supplemental Decision and Order in which it found that the carriers are employees within the meaning of the Act and the district managers are supervisors within the meaning of the Act.[3] On June 25, 1980, the Union filed with the Board a motion for rehearing *en banc,* and on July 28, 1980, the Board denied said motion.

Thereafter, the Union filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. Respondent and the Board then filed motions seeking discretionary transfer to the United States Court of Appeals for the Sixth Circuit and said motions were granted *per curiam* on November 28, 1980.

On June 29, 1982, the court issued its opinion[4] wherein it found that "there is no question but that the . . . fact-finding" of the Board in its Supplemental Decision as to the employee status of the carriers "does have substantial support." However, in view of the Union's argument "that [Respondent] should be equitably estopped from asserting a position completely inconsistent with its past conduct and representations," the court remanded the case to the Board for "the limited purpose of determination of the equitable estoppel issue." The Board accepted the remand and invited the parties to submit statements of position with respect to the issue raised by the remand. Respondent filed such a statement with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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[3] 249 NLRB 1081.

[4] 682 F.2d 116, 118.

The Board accepts the court's opinion as the law in the case, and accordingly has reviewed its Supplemental Decision in light of the court's opinion and Respondent's statement of position. For the reasons set forth below, we conclude that equitable estoppel does not lie in this case and that, in any event, the requisites for application of the doctrine of equitable estoppel are not present herein.

The record shows that the Union filed on February 24, 1970, a petition with the Board seeking ceritification as a representative of the district managers. Thereafter, Respondent and the Union executed a consent election agreement stating that the carriers were nonemployees and that the district managers who directed them were accordingly not supervisors within the meaning of the Act. However, a Regional Director of the Board refused to approve the consent election agreement and submitted the issue of the status of the carriers to the Board. Before that issue was decided by the Board, the Union withdrew its petition and requested the Michigan Employment Relations Commission to conduct an election that was won by the Union which was thereupon certified by the Commission as the bargaining representative of the district managers. Thereafter, said unit was covered by two successive collective-bargaining agreements, the second of which expired in May 1976 when Respondent withdrew its recognition of the Union and refused to bargain with it on the ground that the carriers were employees as defined in the Act and that the district managers who directed them were supervisors within the meaning of the Act. As indicated above, the Board accepted the first remand of the court and agreed with Respondent's position.

We now turn to the issue of equitable estoppel pursuant to the second remand of the court. "It is well established that one who claims under the doctrine of equitable estoppel must show (1) lack of knowledge and the means to obtain knowledge of the true facts; (2) good faith reliance upon the misleading conduct

of the party to be estopped; and (3) detriment or prejudice from such reliance."[5]

However, the Board has in a number of cases held that it is obliged to give paramount consideration to the provisions of the Act regardless of earlier positions taken by any party. Thus, the Board has consistently found that a preelection agreement wherein, as here, an employer stipulates that certain individuals are not supervisors within the meaning of the Act does not estop the employer from subsequently contesting their status because unit inclusion of individuals who are shown to be statutory supervisors would without question contravene the Act.[6]

The Board has also held that it will not recognize the validity of state-conducted elections and certifications where, as here, the composition of the unit is at variance with the policies enunciated by Congress in the Act.[7] The Board further emphasized its obligation to comply with the statutory exclusion of supervisors when it held that even where, as here, certain individuals have for some time been covered by collective-bargaining agreements, It is compelled subsequently to exclude them from the appropriate unit if it can be shown that they meet the test for a Board finding that they are supervisors as defined in the Act.[8]

It is clear from the foregoing Board Decisions that the parties' stipulated unit, the certification of said unit by the State of Michigan, and collective bargaining agreements for that unit prevail under these circumstances. Accordingly, we find that the princip;e of equitable estoppel is not applicable in the instant case.

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[5] *N.L.R.B. v. J.D. Industrial Insulation Company, Inc.*, 615 F.2d 1289, 1294 (10th Cir. 1980).

[6] *Esten Dyeing & Finishing Co., Inc.*, 219 NLRB 286 (1975); *Fisher-New Center Co.*, 184 NLRB 809 (1970).

[7] *Mental Health Center of Boulder County, Inc.*, 222 NLRB 901 (1976).

[8] *Washington Post Company*, 254 NLRB 168 (1981).

However, assuming *arguendo* that equitable estoppel may be applied herein, we find that this case does not meet the essential criteria thereof.

As indicated above, the Regional Director in 1970 refused to approve the stipulated unit of district managers and hence referred the question of its propriety to the Board. The Union, which was therefore fully aware of that outstanding legal issue, nevertheless withdrew its petition without waiting for its resolution by the Board. The Union and Respondent, which then sought and secured a certification of said unit by a state tribunal, proceeded to bargain for that unit. As a result, the Union and its members benefited from Respondent's willingness, despite the lack of Board approval or certification, to enter into and until May 1976 abide by collective-bargaining agreements which covered the district managers. Insofar as the subsequent loss of continued recognition by Respondent constituted a detriment to the Union, it was not attributable to any misleading conduct on the part of Respondent. Accordingly, we conclude that in circumstances of this case there is no basis for equitable estoppel.

As stated above, the court does not question the Board's finding that the carriers are employees within the meaning of the Act and that the district managers are statutory supervisors. As we have found that equitable estoppel does not lie in this case and that, in any event, the requisites for equitable estoppel have not been met, we hereby affirm the Order set forth in the Supplemental Decision of June 6, 1980.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-5311

Newspaper Drivers & Handlers Local #372, etc.,
Petitioner,

v.

National Labor Relations Board,
Respondent,

The Oakland Press Company,
Intervenor.

Before: MARTIN and KRUPANSKY, Circuit Judges; REED, District Judge.

JUDGMENT

ON PETITION TO REVIEW a decision of the National Labor Relations Board.

THIS CAUSE came on to be heard on the transcript of record from the said Agency and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the decision of the said Agency in this cause be and the same is hereby enforced.

It is further ordered that all parties are to bear their own costs on appeal.

Entered by Order of the Court

John P. Hehman, Clerk

Issued as Mandate: AUGUST 23, 1984

COSTS: NONE

Filing fee.....$
Printing.....$
Total.....$

A True Copy.

Attest:

Audrey Crowbell
Deputy Clerk

APPENDIX I

No. 83-5311

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Newspaper Drivers & Handlers Local #372,
a/w International Brotherhood of Teamsters,
Chauffeurs, Warehousemen & Helpers
of America,
Petitioner

v.

National Labor Relations Board,
Respondent

Before: MARTIN and KRUPANSKY, Circuit Judges; and REED, District Judge.*

ORDER

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above styled case; and

No judge in active service in this Court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the Court's opinion,

Now, therefore, the motion for rehearing is hereby denied.

Entered By Order Of The Court

John P. Hehman
Clerk

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* Honorable Scott Reed, United States District Judge for the Eastern District of Kentucky, sitting by designation.

APPENDIX J

SUPREME COURT OF THE UNITED STATES

No. A-348

Newspaper Drivers and Handlers, Local No. 372,
International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

v.

National Labor Relations Board, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner.

It is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 17, 1984.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 2nd
day of November, 1984

APPENDIX K

Federal Statutes Involved

National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

Section 1 (29 U.S.C. § 151):

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of

industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 2 (29 U.S.C. § 152):

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence f, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any

individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. §151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(11) The term "supervisor" means any individual having authority, in the interst of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 8 (29 U.S.C. §158):

(a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 14 (29 U.S.C. §164):

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

APPENDIX L

Relevant Provisions of the Collective Bargaining Agreement Between Newspaper Drivers and Handlers, Local 372 and The Oakland Press Co.

AGREEMENT

THIS AGREEMENT, made and entered into between THE OAKLAND PRESS COMPANY, hereinafter known as the Publisher, and NEWSPAPER DRIVERS AND HANDLERS, LOCAL 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter known as the Union, this 17th day of August, 1973, and to be effective through May 31, 1976.

ARTICLE I. RECOGNITION AND UNION SHOP

SECTION 1

The Publisher recognizes and acknowledges that the NEWSPAPER DRIVERS AND HANDLERS, LOCAL 372, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is the exclusive representative in collective bargaining with the Publisher for all Circulation Department District Managers. The term "employee" or "employees", as hereinafter used in this Agreement, refers to Circulation Department District Managers and Circulation Department Relief Men only.

* * *

ARTICLE VI. SENIORITY

1. Seniority is defined as an employee's length of service from his last date of hire. Strict seniority shall prevail in the layoff and recall of employees. In reducing the work force because of lack of work or other legitimate cause the last employee hired shall be the first employee laid off and the last employee laid off shall be the first employee rehired. A newly hired employee

shall be a probationary employee for the first ninety (90) calendar days, during which period he may be terminated by the Publisher without recourse; provided, however, that the Publisher may not discharge or discipline a probationary employee for the purpose of evading this Agreement or discriminating against Union members. At the successful conclusion of such probationary period the employee's seniority shall be established back to his date of hire.

* * *

F. PENSION PLAN: The Publisher agrees to contribute the amount of $6.00 per week per employee from and after June 1, 1973, to the Union's Central States, Southeast and Southwest Areas Pension Fund. The Publisher will be under no obligation to make other pension contributions on account of employes covered by this Agreement.

* * *

APPENDIX M

Excerpt from Transcript of Proceedings Before Administrative Law Judge

[Pages 57-58: Questioning of District Manager Ronald Hoadley]

* * *

Q. (By Mr. Miller) Mr. Hoadley, in conection with General Counsel's exhibit two, the form agreement, can you tell us whether there has been any change in that to your knowledge in the last four years?

A. The last four years, yes.

Q. When was this form agreement—when did it come into effect?

A. I believe about three years ago, three and a half, something like that.

Q. Since that time has there been any change?

A. No.

Q. In connection with collection procedure, paper distribution center, route allocation or split procedure, have their (sic) been any changes to your knowledge in the manner in which you are supposed to deal with carriers in the last three years?

A. Yes, there has. We used to meet all the carriers on Saturday at a designated corner location, or at their houses, to pick up their money for the paper bill.

Q. And now what is the change?

A. Now carriers in the suburbs are expected to mail in their bill each week.

Q. Are there any other changes in the last three years in relationship with the carrier boys?

A. The price has changed on the paper. But, no, not that I know of.

* * *